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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

ROY E. KRAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MATTHEW BREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI.

Your petitioners pray that a Writ of Certiorari be issued to review a decree of the United States Court of Appeals for the Seventh Circuit entered on January 10, 1966, affirming the conviction of Roy E. Kramer and Matthew Breen in the United States District Court for the Northern District of Illinois.

Opinions Below.

The Opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below is attached as Appendix A.

The Orders of the United States Court of Appeals for the Seventh Circuit affirming the Court below and denying the petition for rehearing of defendants Kramer and Breen are attached as Appendix B and C.

Statement of Jurisdiction.

Defendants Roy E. Kramer and Matthew Breen appealed their conviction in the United States District Court for the Northern District of Illinois to the United States Court of Appeals for the Seventh Circuit. The cases were consolidated before the United States Court of Appeals for the Seventh Circuit, the appeal of Roy E. Kramer being No. 14962 and the appeal of Matthew Breen being No. 14963 in that Court. On January 10, 1966 the United States Court of Appeals for the Seventh Circuit affirmed the judgments of conviction. Petitions for rehearing were thereafter filed and on February 10, 1966 the United States Court of Appeals for the Seventh Circuit denied said petitions.

On February 17, 1966 the mandate of the United States Court of Appeals for the Seventh Circuit was stayed for a period of 30 days in accordance with the provisions of Rule 28 of the Rules of that Court.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Sec. 1254(1).

Questions Presented
By Petition of Matthew Breen.

1) Whether the court below committed prejudicial error in admitting into evidence over the objection of defendant Breen, testimony concerning an uncorroborated post-indictment admission by Breen, which was not admissible and should not have been heard by the jury.

2) Whether the instruction of the District Court Judge to the jury concerning the essential jurisdictional element of interstate commerce was prejudicially erroneous for its failure to describe and adequately convey to the jury the concept of interstate commerce as distinguished from intrastate commerce; and was further prejudically erroneous because of the failure of the trial court to determine as a matter of law whether the facts in evidence supported the conclusion that interstate commerce existed, and the error of the trial court in submitting this determination to the jury. A determination of this issue favorable to defendant Breen will necessarily be applicable to the petition of defendant Kramer.

Questions Presented
By Petition of Roy Kramer.

1. In a prosecution under the Hobbs Act is Interstate Commerce obstructed, delayed or affected, where the only purchases of materials manufactured out-of-state were from a local vendor's inventories? A determination of this question as to Kramer will necessarily determine it as to Breen.

2. In a prosecution under the Hobbs Act, is Interstate Commerce obstructed, delayed or affected in the construction of a new building with a view toward its use

to house a telephone exchange? A determination of this question as to Kramer will necessarily determine it as to Breen.

3. Where purchases from local inventories of goods manufactured out of state which had come to rest will not support the interstate commerce element and new construction intended to house future telephone services will not support interstate commerce, does the combining of such purchases and such new construction satisfy the interstate commerce element? A determination of this question as to Kramer will necessarily determine it as to Breen.

4. Will employees' participation in the construction of a new building intended to house telephone services and their "handling" of materials that had once moved in interstate commerce put them in an industry affecting commerce for the purpose of a conviction under the Taft-Hartley Act?

5. Will the same conduct support a defendant's conviction and consecutive sentences under the Hobbs and Taft-Hartley Acts, or are the crimes defined in those Acts mutually exclusive?

6. If, as the Seventh Circuit Court of Appeals found, the same conduct does support conviction under both Acts, can the policy of the law allow penalties under both acts to be pyramided in the sanction of the conduct?

Constitutional Provisions and Statutes Involved.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> ". . . nor shall any person . . . be deprived of life, liberty, or property without due process of law. . . ."

Title 18, Section 1951, U.S.C.A. (the Hobbs Act) states:

"1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

. . . .

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

. . . ."

Title 29, Section 186, U.S.C.A. states:

"§ 186 . . . .

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1). It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . . .

Statement of the Case.

The Indictment.

Defendants Roy E. Kramer and Matthew Breen were tried before a jury in the United States District Court for the Northern District of Illinois on two counts of an indictment. Count I charged that defendants Kramer and Breen obstructed, delayed and affected commerce and the movement of building materials in commerce, by

extortion; in that they attempted to obtain from D. & N. Ironworks, Incorporated, $3,000, and did obtain $300 from one George E. Noldan, an officer and agent of D. & N. Ironworks. The indictment charges that this payment by Noldan was induced by the wrongful use of fear in that the defendants threatened him with labor disputes, work stoppages and labor troubles in connection with iron and steel installations, part of the construction of an Illinois Bell Telephone Company building in Aurora, Illinois, in violation of Section 1951, Title 18, U.S.C.

Count II of the indictment named as a defendant Roy E. Kramer. Matthew Breen was not named. Kramer is charged in Count II, as an officer and official of Local 393 of Bridge, Structural Reinforcing Steel and Ornamental Ironworkers, Riggers and Machinery Movers Union of Aurora, Illinois, with unlawfully, willfully and knowingly receiving $300 from George E. Noldan as an officer and agent of D. & N. Ironworks, Incorporated. It is further alleged that the above described Local 393 was the labor organization which represented employees of said D. & N. Ironworks, which employees were employed in an industry affecting commerce, all in violation of Section 186(b), Title 29, U.S.C.

The Evidence.

The evidence, to the extent that it bears upon the issues raised in this petition for certiorari, is as follows: Prior to May, 1961 the Illinois Bell Telephone Company planned the construction of a local dial central office in Aurora, Illinois, intended to provide facilities for customer dialing of local, toll, intra and interstate traffic. (A. 19-20). The contract to the general contractor was awarded on May 16, 1961. (A. 20).

D. & N. Ironworks, Incorporated, owned by George Noldan, was awarded the subcontract for the reinforcing structural and ornamental steel in the building. (A. 25)

D. & N. Ironworks and Noldan purchased structural steel for the telephone job from Production Steel Company, located in Broadview, Illinois. Production is a steel and metal warehouse whose business is buying various types and sizes of steel in large quantities so it will be available for sale and immediate delivery from stock to manufacturers and users, "more or less a department store, supermarket." It purchases from United States Steel Corporation and Inland Steel Corporation in Indiana; Bethlehem Steel Corporation in Pennsylvania; and Northwestern Steel and Wire, in Illinois. (A. 21-22). When it sold to D. & N., it sold from inventory (A. 22), and shipped D. & N.'s purchases to D. & N.'s yard in Niles, Illinois.

Channels of R 3 x 3 x ¼ x 20′ (Item 2 on Government's Exhibit 2) were purchased by Production from Inland Steel in Indiana and delivered to Production on July 20, 1961. Five of those channels were shipped to D. & N. on August 4, 1961 at their offices in Niles, Illinois. (A. 80, 87) Production ordered 60′ channels from Inland in Indiana and they were delivered to Production on July 5, 1960. On August 14, 1961, D. & N. ordered 5- 30′ channels from Production. Production cut in half the 60′ channels it had received on July 5, 1960, and shipped the 30′ lengths to the D. & N. office at Niles (next to last item, Government's Exhibit 3). This steel was used on the Bell Telephone job in Aurora. (A. 79-81; 87).

The award of the steel subcontract to D. & N. Ironworks was under the oral stipulation that he had to have men on the job the following day or he would lose

the contract immediately. (A. 25). A foreman for D. & N. Ironworks, one Mel Laturno, went to see defendant Roy Kramer, Business Agent and Treasurer of Ironworkers Local 393 at Aurora. (A. 32). Kramer told Laturno that he could not have men immediately, that 48 hours' notice was required. (A. 25-26).

Testimony was introduced by the government to the effect that the delays in the furnishing of ironworkers to the D. & N. Ironworks and the caliber of the men furnished resulted in delays in the progress and completion of subcontractor Noldan's portion of the job.

Noldan of D. & N. Ironworks, through a friend, caused defendant Matthew Breen to be contacted. Breen, a contractor, was asked by the friend, one Di Carlo, if he knew someone whom Noldan could talk to who could fix him up with good men. Breen refused to help Noldan. In a series of phone calls by Di Carlo to Breen, Breen told Di Carlo that such a favor would cost $3,000, which Breen had to have in one lump because it had to be divided among many people. Di Carlo said Noldan could not afford this sum. Breen said Noldan would get good men and he could make up the $3,000. The matter was not pursued with Breen. (A. 56-62).

Subsequently defendant Kramer indicated that he wished to see Noldan and Noldan visited Kramer in his office. He testified that Kramer told him he knew he was giving him a hard time and asked what it would be worth to resolve his labor difficulties on the job. Noldan said he could not afford $3,000 and Kramer replied that this was the reason "We have adjusted the figure downwards." It was agreed that Noldan would pay Kramer $100 a week to a total of $1,000. (A. 89-90).

The following day Kramer called Noldan and told him the deal was all right with Kramer's people and Noldan could lay off the men he had and other men would be available when he needed them. Thereafter new men showed up on the job, the work proceeded beautifully and Noldan had no further labor trouble. (A. 26, 90-91)

Noldan made several $100 payments to Kramer. In the meantime he had reported the situation to the F.B.I. and his visits to Kramer's office were observed by agents and some of his conversations with Kramer were secretly recorded. (A. 90-93).

On September 22, 1961 on the occasion of the receipt of a $100 payment from Noldan, Kramer was arrested. (A. 130-131).

Bell Telephone Company building was behind schedule about six weeks at completion. (A. 26). The dialing service commenced on October 7, 1962. (A. 20). There was no testimony that any delay in steel erection was the cause of any or all of the six weeks' delay in completion.

Although there was testimony to the effect that both Kramer and Breen in discussing payment had indicated that the money had to be divided with others, Breen never mentioned Kramer's name nor did Kramer ever mention Breen's name. There was no evidence of any payment to Breen or contact with Breen after the date of his mention of $3,000. Except for a post-indictment admission detailed below, the case against Breen ends at this point of Di Carlo's abortive attempt to induce Breen to intercede with Kramer, before Noldan contacted Kramer directly.

To demonstrate the alleged link between Breen and Kramer the prosecution relied heavily upon the fact that Breen had spoken of $3,000, and that when the victim Noldan first walked into Kramer's office he testified "I told him that I could not afford to come up with no $3,000, that this was out of the question, it wasn't this kind of a profit in the job, and therefore he says, well, this is the reason that we have adjusted the figure downwards, and he asked me what I could afford to do." (A. 89-90).

The major thrust of the evidence, however, tending to link Kramer and Breen came from the testimony of a witness named Benson, the successor to Defendant Kramer as an officer of the labor union. Benson's testimony was as follows. (A. 41).

> "We had this negotiating meeting between the contractors, executive board, president, myself, and the secretary, and Donald Russell was discussing a point about the referral system. Mr. Breen looked at him and he said, you can talk now. He said, a few years ago you were a Charley McCarthy.
>
> "He looked at me and the rest and he said, you all were a bunch of Charley McCarthys a few years ago.
>
> "I told Breen, knock it off. Maybe we were Charley McCarthys, but I will tell you what you were, you were the Mortimer Snerd.
>
> "Like hell I was, he said. I was the boss. I called the shots. I gave the orders. I told Kramer what to do.
>
> "He said, I was the boss. Benson, he said, I could tell you a lot of things.
>
> "I said, Breen, you probably could. He said, I was the boss. He said, let us go on with the meeting.
>
> "That was the conversation."

That the jury was permitted to hear this uncorroborated admission over the objection of defendants is one of the basic issues raised by Breen in this Petition for Writ of Certiorari. It is significant that the statement of Breen was made at a labor-management contract negotiating meeting some three years after the offense charged in the indictment and one year after the return of the indictment itself.

Instructions.

In instructing the jury the court discussed at length the topic of commerce and departed from the written instructions submitted by all of the parties. In this colloquy on commerce the court failed to define interstate commerce either as set forth in the statute defining the crime for which defendants were being tried, or by any other definition of interstate commerce. In commenting on commerce the court used the word "commerce" interchangeably with the words "interstate commerce," using the noun "commerce" unmodified by the adjective "interstate" with considerably greater frequency than the whole phrase "interstate commerce." In addition, the court refused to accept the determination of the essential jurisdictional element of interstate commerce as a question of law to be decided by the judge. The court insisted instead that it was a question of fact and as such submitted it to the jury.

That portion of the instruction relating to commerce is as follows: (A. 167-171, 175-176, 177) (Emphasis supplied)

> "Count I charges a violation of what is called the Hobbs Act, and it says—and I paraphrase it and as a matter of fact it has been paraphrased for you by counsel—that Mr. Kramer and Mr. Breen, knowingly,

willfully and feloniously obstructed, delayed and affected *commerce* in the construction of the Illinois Bell Telephone Company building in Aurora in the movement of material, supplies and other commodities required for the construction of that building in *commerce* by extortion; that is, by attempting to obtain property in the value of $3,000 and actually obtaining property in the value of $300 from Mr. Noldan, who was an officer and agent of the D. and N. Ironworks, Incorporated, induced by the wrongful use of fear, in that they threatened Noldan with labor disputes, work stoppages, labor troubles and other economic harm unless he paid them the money.

"The government must prove all of these elements to your satisfaction beyond a reasonable doubt. They must prove first that the defendant, whose case you are considering, whether it is Mr. Kramer or Mr. Breen, that the defendant committed extortion; second, that such extortion obstructed, delayed or affected *commerce* or the movement of goods in *commerce*, and, third, that the defendants did this knowingly, willfully, feloniously.

"Let me repeat three essential elements: One, that the defendants committed extortion; two, that it was extortion which obstructed, delayed or affected *commerce* or the movement of goods in *commerce*, and, three, that they did it willfully, knowingly and feloniously.

"I am going to tell you a little more what each of those means, what extortion means, what *commerce* is and so forth, but those are the three elements.

"Let me point out to you that the Hobbs Act is a federal law which was in effect at the time that the alleged offenses were committed. That law has no reference to or bearing on any action by a labor organization leader honestly carrying out or acting in representing members of his organization. It has reference to and bears on interference with *commerce* by the extortion of money by a labor leader for his own individual enrichment or by the attempt to extort money. The act is not a labor act as such. It is es-

sentially a statute designed to prohibit actions which interfere and affect *commerce*. It is contended, Congress so provided, to be protective of labor organizations and labor members and their membership as well as employers. It is contended to be in the public interest generally.

"The statute makes it a crime willfully—and willfully means intentionally—knowingly and unlawfully to obstruct, delay and affect *commerce* by extortion or attempting to extort or by conspiracy to do so.

. . .

"It is not necessary for you to find in connection with the intent to affect *interstate commerce* that the defendants had this as their primary purpose; that is, that they intended to affect *interstate commerce*. All that is necessary is that they have done something which did affect, did obstruct, did interfere with, did delay *interstate commerce*.

"If you believe the testimony of the government witnesses with reference to where the various materials came from which were supplied to the Illinois Bell job and with reference to the use to which the building upon which the work was to be performed would be put, and if you find that the defendants' activities as shown by the government's testimony did delay, obstruct and affect *interstate commerce* in any way or degree—because that language is used in the statute—then you may find that the government has established the requisite element of effect on *interstate commerce* under the Hobbs Act.

. . ." (Italics supplied)

The Court later instructed the jury as follows:

"With respect to the two counts here involved, Count I involves both Messrs. Kramer and Breen, charges a violation of the Hobbs Act. There are three essential elements which the government must establish beyond a reasonable doubt, and those are that the defendants committed extortion, such extortion obstructed, de-

layed or affected *commerce* or the movement of goods in *commerce* and, third, that their action was willful, knowing and felonious. I told you how extortion is to be determined, *how you are to decide whether their acts,* if any, affected *commerce* . . ." (Italics supplied.) (A. 176.)

One brief charge concerning interstate commerce was made by the Court in connection with Count II, in which defendant Kramer alone was named and that charge was as follows (A. 175):

"The question of *interstate commerce*—let me say to you that if you believe the testimony of the government's witnesses concerning the shipment of steel from outside the state of Illinois and concerning the type of building upon which the ironworkers were employed, then you may conclude, you *may* find that the employees of D. and N. Iron Works, Incorporated were engaged in an industry affecting *interstate commerce.*" (Italics supplied.)

Reasons for Granting the Writ As to Matthew Breen.

I.

Only a minimal fraction of the evidence the government introduced into this case related to defendant Breen. Breen never met or communicated with the victim. The nature of the evidence was such as to make it appear that Kramer had one or more other persons participating with him behind the scenes in the conduct charged as criminal, and the government contended Breen was such a person. For the jury to conclude that Breen was guilty of a Hobbs Act violation, they had to conclude that Breen was a co-venturer with Kramer and, therefore, shared the guilt of the plan of extortion which they believed the evidence indicated Kramer to have carried out. Apparently the jury did so find since a verdict of guilty was returned against Breen. Any fair reading of the evidence leads inevitably to the conclusion that this finding concerning Breen must necessarily have been based in large measure, if not in its entirety, upon a single portion of the evidence relating to Breen. This evidence in essence is that defendant Breen at a labor-management meeting some three years after the offense charged in the indictment and approximately one year after the return of the indictment itself, boasted that in his relationship with Kramer he was the boss, that he called the shots, that he gave the orders, that he told his co-defendant Kramer what to do. This testimony is set out in full at page 11 under Statement of the Case.

It is defendant Breen's position that this conversation, construed by the Court as an admission by Breen was inadmissible, and that permitting its consideration by the jury was prejudicial and reversible error. As evidence it is too vague and imprecise to be a relevant admission. The

conversation does not relate to any specific time when Breen was bossing Kramer, it does not relate to any subject matter or type of relationship in which Breen was the boss over Kramer. In fact, if one views the remark in the context in which it was made (Breen representing management in a labor-management discussion of a referral system and union demands concerning conditions on the job) it relates to matters extraneous to the trial.

An additional basic objection is that to be admissible and to be heard by the jury this statement of Breen's must have been construed by the court as an admission. For the reasons stated above, it is not really an admission. Even if it were it does not meet the tests of admissibility as an admission set forth in the case of *Opper* v. *U. S.*, 348 U.S. 84, 99 L.Ed. 101, 75 Sup. Ct. 158. In the *Opper* case this court said:

> ". . . We think that an accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required . . ."

As to the nature of the corroborating evidence, the court went on to say:

> "However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce *substantial independent evidence* which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith* v. *United States,* No. 52 this Term (348 US 147, 99 L.Ed. 192, 75 S. Ct. 194). It is sufficient if the corroboration supports the essential facts admitted sufficiently to

> justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt." (Emphasis supplied)

The rule clearly emerges that an admission such as we are dealing with here, is not admissible unless corroborated by substantial, independent evidence which tends to establish the trustworthiness of the statement made by the accused and supports the essential facts admitted sufficiently to justify a jury inference of their truth.

A review of the entire transcript reveals no substantial independent evidence corroborating this admission, if, in fact, it was an admission.

In summary, Breen was convicted by a jury which heard no evidence of his direct involvement in the crime charged. Their finding as to Breen's guilt had to rest heavily upon his admission that he was "the boss" and "called the shots" with regard to Kramer's activities. This admission was not admissible because it was not sufficiently precise to clearly relate Breen to Kramer in the context of the labor extortion charge in the indictment, it was not sufficiently precise to relate Breen to Kramer at the time of the crime charged in the indictment or at any specific time, and if it was an admission it was inadmissible as such because there was no substantial corroborating evidence as the law requires.

Finally, as is clear from this Court's opinion in *Opper* v. *United States,* 348 U.S. 84, 75 S. Ct. 158, 99 L.Ed. 101 (1954), the determination by the Court in that case that admissions need be corroborated only by "substantial independent evidence," does not resolve all of the problems inherent in the application of this concept. As this opinion observes, an admission is not a confession of guilt, but only of a fact constituting an essential element of the crime.

In this context what does corroboration mean? Is evidence of some *other* essential element of the crime corroborative, or must the precise element admitted be corroborated? If this latter is the rule, and logic seems to so require, the Court of Appeals for the Seventh Circuit has ignored it here and the conviction of Breen is based on error. If this is not the rule, the holding in *Opper* should be developed and clarified since it stands for a rule of law not now followed or understood. The *Opper* case as it stands may well be construed to mean that evidence of one vital element of the crime could be a bare, uncorroborated post-arrest admission and that substantial independent evidence of other elements of the crime would not only complete the proof of guilt but also "corroborate" (under some extension of the more traditional definition of that word) the element of the crime proved only by the admission.

Because this issue was not framed in this way before this Court in the *Opper* case the issue is not resolved by that case. The relevant portion of the opinion is reported in 99 L.Ed. 101 at 108:

> "Whether the differences in quantum and type of independent proof are in principle or of expression is difficult to determine: Each case has its own facts admitted and its own corroborative evidence, which leads to patent individualization of the opinions. However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith* v. *United States,* No. 52 this Term [348 US 147, 99 L ed 192, 75

S Ct 194]. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

The first part of this quotation indicates that the corroborative evidence must only establish elements of the offense other than the one admitted and by that process at the same time corroborate the admission of the otherwise unsupported element.

The last two sentences of the quotation make it clear that the corroboration must support the essential facts admitted. Thus the element admitted must be corroborated by substantial independent evidence.

Thus this court has yet another crucial aspect of the reliability and admissibility of admissions to resolve before the applicable rule, clarified partly in *Opper*, becomes completely workable and unambiguous. And because the admission in issue here was the controlling evidence in this case, the question must be resolved in the context of Matt Breen's conviction, appeal and petition to this court if Breen is to enjoy due process of law and the even administration of justice in this case.

II.

The instructions of the trial court judge to the jury on the subject of interstate commerce have been heretofore set forth in this petition. Defendant Breen contends that these instructions were seriously prejudicial and constituted reversible error because it was never brought home to the jury what the distinction between commerce and interstate commerce was, and they were clearly left with the impression that if they found that the activities of the defendant had any effect upon "commerce" they could

find the defendant guilty. The words "commerce" and "interstate commerce" were used interchangeably, with "commerce" being used the greatest percentage of the time and the modifying adjective "interstate" being used rarely. In addition, although the statute setting forth the crime with which the defendant is charged contained a clear and concise definition of interstate commerce, neither this definition nor any other definition of interstate commerce was ever given to the jury.

The error was further compounded by the court's submitting to the jury the determination whether interstate commerce existed or not and was affected or not, as a question of fact. This is indicated by the colloquy of the court set forth in Appellant Breen's brief in the U. S. Court of Appeals at page 39 and appearing in the appendix at pp. 149-153:

> "The Court: . . . I have a duty to tell the jury what the statute provides. It is a question of fact whether or not there was an obstruction in any way or effect in any way on interstate commerce here. I am not going to make that determination. They have heard the evidence."
>
> "The Court: What a strange thing to say to the jury. I have decided, ladies and gentlemen of the jury, that if you find certain facts. I am not going to tell a jury that I have decided something for them contingent upon what they determine. I don't think that is the law."

The jury should not have been left this determination; whether or not facts introduced into evidence added up to the legal concept of interstate commerce was for the Judge to determine. *U. S.* v. *Campagna*, 2d Cir. 146, F.2d 524 at 527; *Hulahan* v. *U. S.*, 214 F.2d 441, 445, 446; *Nick* v. *U. S.*, 122 F.2d 660 at page 673. This compounding

of the error here intensifies its seriousness and justifies a reversal based upon it. The jury was first erroneously given the task (outside their proper province) of determining whether there was interstate commerce, as a factual issue. They were then given a confusing colloquy on commerce in which interstate commerce and commerce were used as interchangeable terms and no definition of interstate commerce was ever given. The existence of interstate commerce and the finding of the jury that the conduct of defendants affected said commerce, are facts vital to the jurisdiction of the court as well as to the guilt of the defendant. That the definition of commerce given the jury by the trial judge did not adequately distinguish between interstate and intrastate commerce, or between interstate commerce and commerce in the broadest sense of the word, caused the jury to embark on their deliberations

(a) burdened with a responsibility proper to the judge, the determination of the existence of interstate commerce here;

(b) burdened with the responsibility of determining the existence of interstate commerce and whether defendants' conduct affected interstate commerce without a definition of interstate commerce;

(c) burdened with these determinations respecting interstate commerce, having been misled by the instructions into believing that all commerce is interstate commerce.

A determination of this issue by this Court favorable to Breen will also necessarily involve a favorable determination as to Kramer.

Reasons for Granting the Writ as to Roy E. Kramer.

This Court should issue its Writ of Certiorari in this case on the following grounds:

I.

It is firmly established in federal civil law that essential to federal jurisdiction under the commerce clause is that the regulated conduct be related to some existing commerce, and not to new construction intended to house a future interstate facility. Whether such new construction supports federal jurisdiction under the commerce clause in federal criminal prosecutions under the Hobbs Act is an important question which has not been, but should be, settled by this Court.

II.

It is firmly established in federal civil law that when goods are shipped in interstate commerce to a warehouse, and are eventually sold from the warehouse to a local consumer, the wholly local transaction after arrival does not constitute a part of interstate commerce. Whether such a local sale from inventory will support a prosecution under the Hobbs Act, as obstructing, delaying or affecting commerce is an important question which has not been, but should be, settled by this Court.

III.

If the civil limitations on interstate commerce excepting new construction and goods come to rest apply to criminal prosecutions, the combining of the two exceptions to satisfy federal jurisdiction under the commerce clause in apparent reliance on this court's statement in *Stirone* v. *United States*, 361 U.S. 212, demonstrates the statement requires clarification for present and future defense.

IV.

Similarly, the Court of Appeals ruling that employee participation in the construction of such new building and handling of goods that have come to rest from interstate commerce constitutes engagement in an industry affecting commerce, is so broad as to eliminate any distinction between interstate and local industry and expands federal jurisdiction beyond constitutional limits.

V.

The decision of the Court of Appeals for the Seventh Circuit that the Hobbs Act and the Taft-Hartley Act are not mutually exclusive and that the same conduct will support conviction under both Acts is in conflict with the decision of the Eighth Circuit in *Bianchi* v. *United States*, 219 F. 2d 182 and of the Eastern District of Pennsylvania in *United States* v. *Kubacki*, 237 F. Supp. 638.

VI.

If, as the Court of Appeals for the Seventh Circuit found in this case, the same conduct, the same single transaction can support conviction of violation of the Hobbs Act and can support conviction of violation of the Taft-Hartley Act, it is nonetheless contrary to applicable decisions of this Court to impute to Congress an intent to multiply penalties by multiplying counts (*Bell* v. *United States*, 349 U.S. 81). The double sanction is in conflict with the decisions of the Ninth Circuit in *Barnes et al* v. *United States*, 142 F. 2d 648, the Sixth Circuit in *United States* v. *Quong*, 303 F. 2d 499 and the Second Circuit in *United States* v. *Klein*, 247 F. 2d 908.

DISCUSSION

I.

The proof showed that the planned construction intended eventually for interstate communications traffic was begun on May 16, 1961, (A. 20) and that it was cut into service of interstate communication on October 7, 1962. (A. 20) The acts complained of under this indictment were completed both under the charge and the proof in September of 1961. We submit that the concept of interstate commerce does not embrace the erection of a building, which is intended in the future to house a service creating new commerce. We submit that new construction is not within the purview of interstate commerce nor of Section 1951. We emphasize that this was not the extension of a present existing facility. Compare *Mitchell* v. *C. W. Vollmer and Co., Inc.*, 349 U.S. 427. This question of whether the furnishing of labor for a building which, when completed is intended to supply services in interstate commerce so as to make a person who interferes with the supplying of that labor a federal offense has not been decided in a criminal case. In civil cases it has been thought essential to federal jurisdiction under the commerce clause that the regulated conduct be related to some existing commerce, and not solely to commerce contemplated or planned to have its beginning in the future. See *Kelly* v. *Ford, Bacon and Davis, Inc.*, 3 Cir., 162 F. 2d 555. Under the Fair Labor Standards Act the concept of activity affecting the production of goods for commerce to the construction of new plants or new facilities to house the future production of goods or the future production of services interstate is not included. *Murphy* v. *Reed*, 335 U.S. 865. See also *Mitchell* v. *C.W. Vollmer & Co.*, 349 U.S. at 430 F.N. 2.

There are no criminal federal cases speaking affirmatively on the subject. The question arose in *United States*

v. *Stirone,* 2 Cir., 262 F. 2d 570. In reversing the decision in *Stirone* (361 U.S. 212), this Court found it unnecessary to decide the question of whether new construction intended for future production of interstate facilities was within the interstate commerce clause, and, therefore, did not decide it. (361 U.S. at 215). The Second Circuit in *Stirone* (reversed by this Court) followed its own decision in *Mitchell* v. *Hodges Contracting Company,* 5 Cir., 238 F. 2d 380. However, subsequently, the Seventh Circuit in *Mitchell* v. *S. A. Healy Company,* 284 F.2d 39, refused to follow the *Hodges* case, but instead found himself bound by this Court's decision in *Mitchell* v. *H. B. Zachery Co.,* 362 U.S. 310.

A determination of this question as to *Kramer* necessarily involves a similar determination as to *Breen.*

It is essential to the administration of federal criminal law to determine whether the restrictions on federal jurisdiction under the commerce clause are subject to the same limitations as those so firmly established in federal civil law. We submit that this very important question has not been, but should be now ruled on by this Court.

II.

The next question is whether the purchase of steel manufactured outside the State of Illinois, but used in the State of Illinois in the construction of the new building was capable of obstructing commerce.

This concerns only some 10 channels of steel purchased by Production Steel Company in Broadview, Illinois, from Inland Steel in Indiana, and which D & N purchased from Production, and which George Nolden said was used in the construction of the Bell Telephone building. This is the only supply or commodity used by Nolden and D & N that was shown to have once been in inter-

state commerce. Production is a warehouse who buys in large quantities so that it will have stock available for immediate delivery to purchase from that stock. As Mr. Maier, manager of Production's order department, described Production, it is "more or less a department store, supermarket." Production had channels of steel in stock which it had had delivered to it on July 20, 1961, and on July 5, 1960. D & N ordered 5 pieces of each respective shipment, which were delivered to D & N on August 4 and August 14, 1961, respectively. These were delivered at D & N office in Niles, Illinois. Apparently, from there they were transported by D & N to Aurora. Production has its place of business in Broadview, Illinois. It is our submission that the channels of steel when delivered to D & N were clearly outside the stream of interstate commerce. Not only did the materials involved come to rest, but the August 10th delivery consisted of goods that had, after cessation of interstate commerce and within the State of Illinois been altered and changed (A. 79-81).

We submit it is a settled rule of constitutional law that goods cease to constitute a part of interstate commerce, and become a part of the general property in a state, and amenable to *its* laws, when they are sent into a state for the purpose of sale or in consequence of a sale. *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Welton* v. *Missouri*, 91 U.S. 275; *Bowman* v. *Chicago & N.W. Ry.*, 125 U.S. 465; *Packer Corporation* v. *Utah*, 285 U.S. 105; *State of Florida* v. *United States*, 282 U.S. 194; *Yonkers* v. *United States*, 320 U.S. 685; *Palmer* v. *Massachusetts*, 308 U.S. 79.

It is our submission that once the steel reached the "department store, supermarket", it assumed a wholly local character, a means for the conduct of a local busi-

ness. This function was that of an ordinary warehouse or a retail establishment and bears no resemblance to a "throat" or a "current of commerce". Upon delivery to the "department store, supermarket", interstate commerce had ceased, *Schechter Poultry Corp.* v. *United States*, 295 U.S. 498; *Atlantic C. L. R. R.* v. *Standard Oil Company*, 275 U.S. 257, and the mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce. *Jewel Tea Co.* v. *Williams*, 10 Cir., 118 F. 2d 202, 207; *Lipson* v. *Socony Vacuum Corp.*, 5 Cir., 87 F. 2d 265, 267; *Walling* v. *Goldblatt Brothers*, 7 Cir., 128 F. 2d 778, 783. These rules are firmly established in the civil law. It is an important federal question to determine whether these rules also apply to a prosecution under the Hobbs Act as supporting obstruction, delay, or affecting of commerce; and this important question should be settled by this Court. A determination of this question as to *Kramer* necessarily involves a determination as to *Breen*.

III.

As seen hereinbefore, the civil law has firmly established that new construction will not support federal jurisdiction under the commerce clause, and that out-of-state manufactured products having come to rest will not sustain jurisdiction under the interstate commerce clause. It is, as we have noted, inconceivable that criminal jurisdiction has a lesser standard, since the source of their jurisdiction is the same. However, it is apparent that the United States Court of Appeals took comfort and sought access to jurisdiction through the tempered words of this Court. We invite the Court to note the similarity of its wording to that of this Court in *Stirone* v. *United States*, 361 U.S. 212. The Court of Appeals for the Seventh Circuit held:

"The question whether or not construction of such a building (intended as a telephone exchange), *standing alone*, would satisfy the interstate commerce aspect of the Hobbs Act, which was left undecided by the Supreme Court in *Stirone*, need not to be determined in the instant case *since there are additional factors bearing on this question.* The construction of the building utilized materials moving in commerce such as cut stone.* Although the steel channels installed by Noldan were obtained from local inventories, delay in their installation may be deemed to have resulted in delay in the replenishment of such inventories by commodities moving from outside the State of Illinois." (App. 6a) (Emphasis Ours)

Thus it seems obvious that the Court of Appeals borrowed the wording of this Court:

"Whether prospective steel shipments from the new steel mills *would be enough, alone,* to bring this action under the Act is a more difficult question. We need not decide this, however, . . ." *Stirone* v. *United States,* 361 U.S. 212, 215, in reversing 262 F. 2d 571. (Emphasis Ours)

The comfort derived from the United States Court of Appeals for the Seventh Circuit is that a questionable basis for jurisdiction under the interstate commerce act,

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* We urge the Court not to be dissuaded by this reference. The reliance on the "cut stone" is entirely unsupported by the record. The record in that regard reads solely, "Some of the material used in the building came from out of state, masonry materials, such as cut stone, from Wisconsin, and glazed tile from Indiana." (App. 24) This obviously stands on no better footing, in fact not as good footing as the steel channels, which also were manufactured out of state. The process of the cut stone was never elaborated upon, and for all we know, may have rested in Illinois for years. Aside from which, it had nothing to do with D & N Ironworks, the only em-

can be made unquestionable by the combination with another factor which constitutes no basis for such jurisdiction, to wit the steel channels that had come to rest in the State of Illinois prior to their sale to D & N Ironworks.

We do not believe it was the intention of this Court to combine two factors, new construction and products come to rest, which could never individually be the basis for jurisdiction under the commerce clause, to support such jurisdiction. Nothing plus nothing must equal nothing. We submit this Court should clarify its decision since it seems to have confused the United States Court of Appeals for the Seventh Circuit and unconstitutionally extends the aspect of interstate commerce, the basis of its jurisdiction, if any exists. A determination of this question as to *Kramer* necessarily involves a determination as to *Breen*.

IV.

We rely on the argument made under Point III hereinabove in support of the proposition that employee participation in new construction and handling of goods that came to rest from interstate commerce does not constitute engagement in an industry affecting commerce, and the decision of the United States Court of Appeals eliminating distinction between interstate and local industry on that account is an unconstitutional invasion of the rights of the states, and attempts to extend federal jurisdiction beyond constitutional limits.

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* (Continued)
ployer and only alleged extortee appearing in the indictment. Like the main decision in *Stirone*, reliance on the cut stone, even if shown to have relation to interstate commerce, which it does not, would constitute an amendment of the indictment.

V.

Under Count I of the indictment the petitioner Kramer charged with and convicted of the wilful, knowing, and felonious obstruction, delay, and affecting of commerce through attempting to obtain property of value of $3,000.00 and obtaining property of the value of $300.00 from George E. Nolden, with Nolden's consent induced by the wrongful use of fear of, among other things, economic herms in violation of Section 1951, Title 18, United States Code. (A. 4-5)

Under Count II of the indictment, the petitioner, Kramer, a representative of employees in Local 393, Bridge, Structural Reinforcing Steel and Ornamental Ironworkers, Riggers and Machinery Movers Union, Aurora, Illinois, was charged with the unlawful, wilful and knowing reception and acceptance from George E. Nolden of the same $300 in violation of Section 186(b) Title 29, United States Code. (A. 5-6)

Said petitioner moved to dismiss the indictment on the grounds that the allegations of Count I and II were mutually inconsistent and could not both support a guilty finding on account of the same acts. (A. 10-15). In anticipation of the possible adverse ruling on the Motion to Dismiss the Indictment on that ground, said petitioner made a motion that the Government be required to elect between Counts I and II on the grounds of misjoinder and inconsistency, and the fact that the pleader had merely varied his statements in those counts in order to avoid at the trial an acquittal by reason of an unforeseen lack of harmony between the allegations and the proof, and on the ground that the inconsistent charges of Counts I and II confounded and embarrassed him in his defense and would have the effect of confusing the jury. (A. 9-10) It is the submission of said petitioner that the denial of those said motions constituted prejudicial error.

The essence of the offense under which Kramer was indicted and convicted on Count I is extortion. The essence of the offense for which he was convicted under Count II is in the nature of bribery. There is a substantial difference between these offenses.

> "The Taft-Hartley Act provision makes it unlawful for an employer to give to his employees' representative any money or thing of value, and likewise makes it unlawful for such representative to receive from any employer any money or thing of value. The following language is included in the requested instructions:
>
> > 'The difference between the lesser crime and the crimes charged under each count of the indictment is the lack of force, violence and fear and the lack of intent on the part of the defendants to employ force, violence and fear to obtain money or any other thing of value from Feliz Johnson.'
>
> "The Taft-Hartley offense is in the nature of bribery. The offense for which the defendants were tried is extortion. There are substantial differences between these offenses." *Bianchi* v. *United States*, 8 Cir., 219 F. 2d 182, 193.

Under Count I, Kramer was charged with and convicted of having *exacted* property by force, violence and fear. Under Count II he was charged and convicted with being the passive *recipient* and *acceptor* of property without the elements of fear, violence, or force and lack of intent on his part to employ force, violence or fear. Patently if the Eight Circuit in *Bianchi* is correct, the same facts could not constitute both crimes, and, further it is equally patent that the Grand Jury, which returned this indictment, could not have had reasonable cause to believe that both Statutes were violated by the same act. Nor could the petit jury have found beyond reasonable doubt that both

statutes were violated by the same acts. Said petitioner by the same acts could not have committed the two inconsistent offenses. Mutual exclusion of conviction of violations of Title 18, U.S.C. Section 1951 and Title 29 U.S.C. Section 186(b) is recognized in all prior decisions rendered on the subject:

> "The definition of extortion used in §1951 is taken from New York law (*United States* v. *Nedley*, 255 F. 2d 350 (3d Cir., 1958)) and New York interpretations of that crime are helpful. Under New York law, the crimes of bribery and extortion are mutually exclusive. One who pays a bribe is equally as guilty as the one who receives it, 'which could never be the case with extortion.' *People* v. *Dioguardi*, 8 N.Y. 2d 260, 273, 203 N.Y.S. 2d870, 881, 168 N.E.2d 683, 692 (1960). The court in Dioguardi noted the distinction between bribery and extortion, the essence of the one being the voluntary giving of something of value to influence the performance of official duty, the essence of the other being duress." *United States* v. *Kubacki*, E.D.Pa. 237 F.Supp. 638, 640.

The decision of the Court of Appeals of the Seventh Circuit finding no inconsistency between the charges:

> "The Hobbs Act, §1951, Title 18 U.S.C.A. proscribes interference with commerce by threats or violence. It comprehends the offense of extortion. §186(b) of Title 29, U.S.C.A., of the Labor Act, states a misdemeanor offense, independent and separate from that of the Hobbs Act felony. When the charge under the Labor Act is based on a coercive demand or request by a representative of employees, this conduct may also constitute extortion under the Hobbs Act. The fact that the same conduct may give rise to separate and independent violations of law does not render the charges or convictions based thereon inconsistent or mutually exclusive." (App. 5a)

is totally inconsistent with every prior decision of United States Courts on the subject.

VI.

This point is correlative of the next preceding point. If, as the United States Court of Appeals for the Seventh Circuit found, the same conduct, the same acts, the same transaction, describes an offense under the Hobbs Act and at the same time describes an offense under the Taft-Hartley Act, it is contrary to establish law to impute the Congress an intent to multiply penalties inflicted upon a defendant by the simple expedient of charging that defendant with a violation of the Hobbs Act in one count, and the Taft-Hartley Act in another. Basically it is also contrary to common sense that the same act should be a misdemeanor under Taft-Hartley, and a felony carrying a maximum of twenty years under the Hobbs Act. This Petitioner has been given a substantial penalty under Count I (The Hobbs Act), and a consecutive penalty of an extended period of probation under the Taft-Hartley Act, all for the same identical conduct. This is contrary to applicable decisions of this Court:

> "When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States,* 348 U.S. 81, 83.

It is also in conflict with decisions in other circuits that hold the prosecution may allege the same charge in different counts with the protection that only one penalty is permitted. *United States* v. *Klein,* 2 Cir., 247 F. 2d 908, 919; *United States* v. *Quong,* 6 Cir., 303 F. 2d 499, 506; *Barnes et al* v. *United States,* 9 Cir., 142 F. 2d 648, 650.

Conclusion.

For the foregoing reasons, petitioners Roy E. Kramer and Matthew Breen respectfully submit that a Writ of Certiorari to the Seventh Circuit Court of Appeals should be granted to review the decrees affirming the convictions of each of them.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 14962 and 14963 SEPTEMBER TERM AND SESSION, 1965

No. 14962
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROY E. KRAMER,
Defendant-Appellant.

No. 14963
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MATTHEW BREEN,
Defendant-Appellant

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 10, 1966

Before DUFFY and SWYGERT, *Circuit Judges,* and GRUBB, *Senior District Judge.*

GRUBB, *Senior District Judge.* The consolidated appeals are taken from judgments of conviction based on jury verdicts of guilty as charged in Counts One and Two of a Ten-Count Indictment. Count One charged defendants Roy Edward Kramer and Matthew Breen with a violation of §1951, Title 18 U.S.C.A., commonly known as the Hobbs Act. Kramer was the sole defendant in Count Two which states a violation of §186(b), Title 29

U.S.C.A., §302(b) of the Labor Management Relations Act of 1947, as amended in 1959.

The charges arose out of certain transactions which took place between one George E. Noldan, the owner of D. and N. Ironworks, Incorporated, of Niles, Illinois; Kramer, who was an officer of Local 393, Bridge, Structural Re-inforcing Steel and Ornamental Ironworkers, Riggers and Machinery Movers Union of Aurora, Illinois, and Breen who was an ironworks contractor. On June 1, 1961, Noldan's company obtained the sub-contract for the reinforcing structural and ornamental steel work on new construction in Aurora, Illinois, for the Illinois Bell Telephone Company. The building on completion was intended to house a local dial central office for customer dialing of local, toll, intra- and interstate telephone traffic. The sub-contract carried an oral stipulation that Noldan would have men on the job the following day or he would lose the contract immediately.

From the evidence of record the jury could find that on the day the sub-contract was let, the job supervisor for the general contractor on the construction and the foreman for Noldan's company went to see Kramer, the business agent and financial secretary and treasurer of Local 393, and asked him to furnish ironworkers to unload reinforcing steel for the Illinois Bell Telephone job. Kramer questioned why a local contractor did not get the job and told them that they could not have the men because 48 hours' notice was required.

It was Kramer's function to determine which men were to be sent on a given job. On other occasions, when an order was put in for ironworkers, the men were sent out the following day or sometimes in two days. No men were furnished in this instance and the general contractor had to unload the steel for the Illinois Bell Telephone job himself.

Early in June, one Ruckino DiCarlo, a concrete construction contractor who had known Noldan and Breen for more than ten years, contacted Breen on behalf of Noldan. Breen, a member of the local contractor's association, had been an unsuccessful bidder on the Illinois Bell Telephone construction. DiCarlo told Breen that Noldan had the ironwork contract and needed good men "to make out." Breen answered that he could do nothing since it was supposed to have been his job. After talking to Noldan,

DiCarlo called Breen again to inquire what could be done for his friend. Breen said that if Noldan needed help "it is going to cost him." DiCarlo then contacted Noldan and once more called Breen. He was told by Breen that it would cost $3,000.

After this last telephone conversation, DiCarlo called on Breen to see if the amount could be reduced or made in partial payments. Breen stated that it would have to be in one lump sum. After contacting Noldan, DiCarlo again called Breen to ask if he would take $50 or $100 a week. Breen refused. It would have to be in one lump sum because it had to be divided among so many people. If Noldan paid $3,000, he would have good men and be able to make up the $3,000 by having good apprentices, good journeymen, and he would be able to use his own men and work shorthanded. If Noldan did not have $3,000, Breen said he shouldn't be in the business.

The ironworkers furnished to Noldan in June and July were poor in quantity and quality. On August 1, 1961, he called Kramer and said that he understood Kramer wished to see him. Noldan and Kramer met on August 2, 1961. Kramer said he knew he was giving Noldan a hard time and asked him what it would be worth to resolve his labor difficulties. Noldan told him that he could not afford to come up with $3,000. Kramer replied, "Well, this is the reason that we have adjusted the figure downwards." He inquired what Noldan could afford and stated that $400 or $500 would not be adequate since it would have to be split three or four ways. He further stated that his people had offered to make or adjust the amount downward to a figure of about $1,000, and wondered if Noldan could manage this sum. Noldan said he could not handle the amount in "one piece," but could pay it as a payroll expense of about $100 a week. Kramer stated that he would have to talk to his people. He called Noldan the next morning and informed him that the deal was all right with his people and that Noldan could lay off the men that were on the job, referring thereby to the slow ironworkers previously furnished.

Noldan again talked to Kramer on August 4 and August 7 and was assured that men would be available when necessary. The work progressed well and there was no further labor trouble. On August 18, Noldan again called

Kramer to confirm the financial arrangements. His offer to pay by check was rejected; Kramer wanted it "fresh."

Noldan made three payments of $100 each on August 23, September 1, and September 22, 1961, respectively. On the date of the last payment, agents of the FBI confronted Kramer. After this date, the work proceeded very poorly.

The Illinois Bell Telephone building was not completed until six weeks after the scheduled completion date. Various delays in construction were caused by labor difficulties.

In the construction of the Illinois Bell Telephone building materials were used which came from sources outside of the State of Illinois. Included in these materials were cut stone and steel channels. The latter commodities were furnished to Noldan from inventories within the State of Illinois, which came from sources in Indiana on July 20, 1961.

Kramer contends that he has been charged with and convicted of offenses which are mutually inconsistent through performance of the same acts. He further challenges the sufficiency of the proof as to various elements of the offenses and claims that there was prejudicial error in evidentiary rulings, in the denial of severance for trial, in allowance of improper argument to the jury and in the charge to the jury. Breen challenges the sufficiency of the proof to sustain his conviction and also claims prejudicial error in evidentiary rulings, in the charge to the jury, in the denial of his request for severance, and for waiver of the jury.

Consistency of Offenses

The contention as to the inconsistency of the charges of the indictment and the convictions is based on a misconception as to the scope of the misdemeanor offense under the Labor Act.

In the enactment of §186(b), Title 29 U.S.C.A., the Labor Management Relations Act of 1947, as amended 1959,[1]

[1] "§186. *Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.*

• • •

"(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

Congress did not intend to duplicate state criminal offenses. It was concerned with adequate criminal sanctions for conduct that would corrupt the collective bargaining process, including all forms of bribery and extortion. See Analysis of Labor-Management Reporting and Disclosure Act of 1959, 1959 U.S. Code Cong. & Ad. News, 2318, 2360, and *Arroyo* v. *United States*, 359 U.S. 419, 424-426 (1959).

The terms of the statute are not limited to receipt and acceptance which may be passive, but also penalize the request and demand of any payment. The words "request" and "demand" are not qualified. They contemplate a situation where an employee representative might resort to pressure to obtain payment by conduct that may be characterized as coercive. *Arroyo* v. *United States, supra*, at 426.

The Hobbs Act, §1951, Title 18 U.S.C.A.[1] proscribes interference with commerce by threats or violence. It comprehends the offense of extortion §186(b) of Title 29 U.S.C.A., of the Labor Act, states a misdemeanor offense, independent and separate from that of the Hobbs Act felony. When the charge under the Labor Act is based on a coercive demand or request by a representative of employees, this conduct may also constitute extortion under the Hobbs Act. The fact that the same conduct may give rise to separate and independent violations of law does not render the charges or convictions based thereon inconsistent or mutually exclusive.

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[1] §1951 *Interference with commerce by threats or violence.*

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory, or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Sufficiency of Proof

The sufficiency of proof has been challenged as to the element of interstate commerce under the Hobbs Act; the element of fear as part of the proof concerning extortion under the Hobbs Act; the status of Kramer as a "representative" of employees under the Labor Act; the interstate nature of the employment of the employees represented by Kramer for purposes of the Labor Act; and the willfulness of Kramer's conduct under the Labor Act. Breen also challenges the lack of substance of the totality of the evidence to sustain his conviction under the Hobbs Act.

The Hobbs Act prohibits conduct that "obstructs, delays or affects commerce or the movement of any article or commodity in commerce." The broad language contemplates interference with commerce in "any way or degree." *Stirone* v. *United States,* 361 U.S. 212, 215 (1960).

The test of interstate commerce under the Hobbs Act differs from that under the Sherman Act. *Carbo* v. *United States,* 314 F.2d 718, 732 (9th Cir. 1963), cert. denied 377 U.S. 953. Similarly, decisions construing the interstate commerce requirement under the Fair Labor Standards Act are not controlling as to the requisite manner or degree of interference with commerce that may justify conviction under the Hobbs Act.

The intended use of the Illinois Bell Telephone building as housing for an interstate commeree facility presents a more direct involvement with commerce than did the construction of a building intended for the manufacture of goods ultimately destined for shipment in commerce as in *Stirone* v. *United States,* 361 U.S. 212, 215 (1960). The question whether or not construction of such a building, standing alone, would satisfy the interstate commerce aspect of the Hobbs Act, which was left undecided by the Supreme Court in *Stirone,* need not be determined in the instant case since there are additional factors bearing on this question. The construction of the building utilized materials moving in commerce such as cut stone. Although the steel channels installed by Noldan were obtained from local inventories, delay in their installation may be deemed to have resulted in delay in the replenishment of such inventories by commodities moving from outside the State of Illinois.

The totality of interstate aspects that were subject to obstruction by delay in the construction shown here suffices to satisfy the interstate commerce element of the Hobbs Act.

It is submitted that Noldan was induced by reasons other than fear to part with his money. There was no evidence of any direct threat or refusal to supply good ironworkers. Nevertheless, the activities of Kramer and Breen strongly conveyed the impression that there would be labor difficulties unless and until Noldan agreed to pay. Breen told DiCarlo that it would cost Noldan $3,000 to get good workers. Kramer asked Noldan what it would be worth to end the hard time he had been giving him.

The prospect and the experience of unwarranted labor difficulties such as the unavailability of workers and being furnished with inadequate workers with resultant delay in the performance of a construction contract present a threat of financial loss to the contractor. Noldan testified that he paid because he did not want to see his business "go out the window." The jury could infer that Noldan's fear of economic loss was reasonable and that it induced him to make the payments. Conduct that brings about a state of mind of fear of financial loss constitutes extortion under the Hobbs Act. *United States* v. *Dale*, 223 F2d 181, 183 (7th Cir. 1955); *United States* v. *Postma*, 242 F.2d 488, 492 (2nd Cir. 1957), cert. denied 354 U.S. 922.

Respecting the question of Kramer's status as a representative of employees under the Labor Act, one Robert Benson testified that Kramer was the financial secretary and treasurer as well as the business agent of Local 393 during the indictment period. As business agent, Kramer was the recognized representative of the Local and had jurisdiction of all stewards; he would send men on jobs and try to solve all difficulties on jobs to the best interests of all sides. Benson, a fellow officer in Local 393, had first-hand knowledge of the nature and scope of Kramer's duties and authority.

The challenge to this evidence rests on the premise that the testimony of Benson was incompetent to establish the scope of Kramer's agency because Benson was a fellow agent. The objection is not valid. The testimony was not offered for the purpose of binding the principal, that is, the membership of Local 393, but to establish Kramer's

status in order to determine whether his conduct was actionable under the Labor Act. For this purpose, Benson's testimony is appropriate. It establishes without contradiction that Kramer was a representative of employees within the purview of Section 186(b), Title 29 U.S.C.A. *United States* v. *Ryan*, 350 U.S. 299, 302 (1956).

For purposes of the Labor Act, which demonstrates the full reach of congressional power under the Commerce Clause of the United States Constitution, the members of Local 393 may be deemed to have been employed in an industry affecting commerce. They work in all phases of ironwork; structural, ornamental, machinery moving and reinforcing. In this case, they participated in the construction of a building intended as housing for an interstate facility. They handled materials that had moved in interstate commerce. See *United States* v. *Pecora*, 267 F.2d 512, 515, 516 (3rd Cir. 1959).

Kramer also contends that the evidence does not suffice to establish the willfulness of his conduct found to violate the Labor Act. The pattern of Kramer's activities—the negotiating and bargaining with Noldan concerning the amount and manner of payment, his gratuitous advice as to how to stay out of trouble with the income tax people in the transaction, and the acceptance of three payments of $100 each—satisfies the element of willfulness under Section 186(b), Title 29 U.S.C.A. *United States* v. *Keegan*, 331 F.2d 257 (7th Cir. 1964), cert. denied 379 U.S. 828.

Breen submits that the evidence against him does not suffice to sustain his conviction under the Hobbs Act. The record shows no direct contact between Breen and Noldan. Neither Kramer nor Breen mentioned the other's name in their dealings with Noldan and DiCarlo. Breen's involvement in the extortion scheme is shown principally by the conversations he had with DiCarlo in June 1961. However, the import of these conversations, considered in light of subsequent events, is highly incriminatory.

Breen indicated the cost of resolving Noldan's labor difficulties as $3,000 to be split among several parties. His comment that Noldan should not be in the business if he could not afford to pay this amount to get good union help, after he was made aware of Noldan's troubles in being able to meet the required performance under his

subcontract on the Illinois Bell Telephone construction, may be considered as a veiled threat—pay or else! When Noldan, after experiencing continued difficulties, finally contacted Kramer some two months later, Kramer acknowledged that Noldan could not afford the previously discussed payment and indicated that "his people" had agreed to adjust the figure. Breen's earlier promises of good workmen, good journeymen and the right to work shorthanded support a reasonable inference that there was a link between Breen and someone with Local 393 who had authority to implement these promises. That Kramer was that person, is confirmed by his knowledge of the previous discussions.

Four months after the indictment issued in this case, at a negotiating meeting between contractors and officials of Local 393, Breen, referring to his relations with the Local at a time "a few years ago," said: "I was the boss. I called the shots. I gave the orders. I told Kramer what to do." These statements, considered in light of his earlier promise of cooperation if Noldan met the price further confirms the fact that Breen and Kramer were acting together in the extortion scheme during the indictment period.

The post indictment statement constitutes an admission on the part of Breen. Voluntarily made at a time when Breen was already facing the Hobbs Act charge, it may be deemed trustworthy. Its substance is corroborated by the gist of his earlier statements to DiCarlo, by Kramer's familiarity with the proposals, by Kramer's need to obtain the approval of "his people" before confirming the arrangement and, generally, by the sequence of events which showed that the labor difficulties ended when Noldan promised to pay. Under these circumstances, Breen's post indictment admission is admissible in evidence against him. *Opper* v. *United States,* 348 U.S. 84, 91, 92 (1954).

On appeal, the evidence is viewed in a light most favorable to the government, together with all reasonable inferences which might have been drawn therefrom. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Iacullo,* 226 F.2d 788, 795 (7th Cir. 1955), cert. denied 350 U.S. 966. There is substantial probative evidence of record, direct and circumstantial, to support the verdict against Breen.

Severance

Kramer and Breen contend that each was prejudiced by the denial of severance for trial. As to the receipt into evidence of Breen's post indictment statement, the trial court adequately instructed the jury at the time of admission and again during the course of the charge that this statement was not to be considered against Kramer. No prejudice is to be inferred from this instance. *Anderson* v. *United States,* 270 F.2d 124, 126 (6th Cir. 1959); *United States* v. *Glasser,* 116 F.2d 690, 701 (7th Cir. 1940), aff'd. 315 U.S. 60; and see *Schaffer* v. *United States,* 362 U.S. 511, 515-517 (1960).

Although the evidence showed that Kramer was the person who arranged the final details and received the payments in the scheme, the proof against Breen was not so insubstantial that the finding of his guilt must be deemed to have resulted from the impact of the case against Kramer.

The same series of transactions gave rise to the charges against Breen and Kramer. The proof presented no unusual difficulties or complexities that might have tended to confuse the jury in assessing the evidence relating to either defendant. There was no abuse of discretion in the denial of the requests for severance. *Opper* v. *United States,* 348 U.S. 84, 94-95 (1954). The unusual circumstances underlying the decision in *United States of America* v. *Echeles,* ..... F.2d ..... (7th Cir. 1965),[3] have not been shown to be present in the case. Perhaps Breen and Kramer might have had a better chance of acquittal if each had stood trial separately. This possibility does not give them the right to severance if the entire record discloses that their joint trial was without prejudice to either defendant. *Robinson* v. *United States,* 210 F.2d 29, 32 (D.C. Cir. 1954).

Waiver of Jury

The claim of prejudice in the denial of the request for waiver of jury by Breen is based on the potential effect which disclosure of a prior murder conviction might have had on the jury if Breen had elected to take the stand.

[3] The need for severance in the *Echeles* case was based principally on the fact that one defendant was unable to elicit in a joint trial an exculpatory statement previously made by a co-defendant.

It may not be surmised that the jury would have been inflamed or that the publicity attendant such a disclosure would have prevented the jury from making a fair assessment of the evidence against Breen. The hypothetical prejudice does not give rise to the exceptional situation which might render impartial trial by jury unlikely or impossible, thereby furnishing a compelling reason for rejecting the government's insistence on its right to consent to the waiver under Rule 23(a) of the Federal Rules of Criminal Procedure, Title 18 U.S.C.A. *Singer* v. *United States*, 380 U.S. 24 (1965); and see *United States* v. *Igoe*, 331 F.2d 766 (7th Cir. 1964), cert. denied 380 U.S. 942.

Instructions

The trial court did not give a requested definition of interstate commerce which was substantially similar to that of the Hobbs Act, but left the determination of the existence of this element to the jury with this charge:

> "If you believe the testimony of the government witnesses with reference to where the various materials came from which were supplied to the Illinois Bell job and with reference to the use to which the building upon which the work was to be performed would be put, and if you find that the defendants' activities as shown by the government's testimony did delay, obstruct and affect interstate commerce in any way or degree—because that language is used in the statute—then you may find that the government has established the requisite element of effect on interstate commerce under the Hobbs Act."

This charge defines interstate commerce by implication. Although a more precise definition in the words of the statute is to be preferred, see for example, LaBuy, Manual on Jury Instructions—Criminal, Section 15.02 *"Offenses of Labor Racketeering,"* 36 F.R.D. 457, 596, the charge in this case was not so inadequate that the jury could not determine the question fairly.

In respect to the instruction concerning the common plan of Kramer and Breen, charged in Count One of the Indictment, it is contended that the jury would have been confused in this case, which involved only two defendants, by the statement:

"... If there was a common plan and one of the defendants was not a party to it, then what I am about to say is not applicable to that defendant."

In the context of the substantial and clear instructions concerning the common plan and the admissibility of evidence against either defendant under such a charge, this single sentence was not likely to confuse the jury. There was no prejudicial error in the instructions.

Other grounds raised by defendants on which to set aside the convictions are without merit. Counsel complains of prejudicial error in the limitation of cross-examination. It appears that the line of questioning rejected by the court related to prior dealings between Kramer and Noldan and was offered on the question of Noldan's state of mind as to his fear of injury to his business. The rejected line of questions is neither relevant nor within the scope of the direct examination in the case. There was no abuse of discretion in the ruling. See *United States* v. *Lawinski*, 195 F.2d 1, 7, 8 (7th Cir. 1952).

Defendants also contend that counsel for the government exceeded proper argument to the jury by the statement that Noldan was a "giant" for testifying in the case. Allowance of this zealous effort to build up the witness falls short of constituting prejudicial error. See *United States* v. *Achilli*, 234 F.2d 797, 802 (7th Cir. 1956) aff'd. 353 U.S. 373 (1957).

The judgments of conviction are AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, January 10, 1966

Before
Hon. F. Ryan Duffy, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Kenneth P. Grubb, *District Judge (Senior)*

United States of America, *Plaintiff-Appellee,* No. 14962, 14963 *vs.* Roy E. Kramer, Matthew Breen, *Defendants-Appellants.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Thursday, February 10, 1966

Before
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. KENNETH P. GRUBB, *District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 14962, 14963
vs.
ROY E. KRAMER,
MATTHEW BREEN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause, filed by defendants-appellants herein, be, and the same is hereby, DENIED.

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